Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-885

In The
Supreme Court of the United States

ALEXIS WITT, on behalf of the
Estate of Dean Witt, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE JOHN MARSHALL LAW SCHOOL VETERANS LEGAL SUPPORT CENTER & CLINIC, THE VETERANS LEGAL ASSISTANCE CLINIC AT THOMAS JEFFERSON SCHOOL OF LAW, THE LEWIS B. PULLER, JR. VETERANS BENEFITS CLINIC AT THE COLLEGE OF WILLIAM & MARY AND MICHAEL J. WISHNIE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL P. SENG
Counsel of Record
JOSEPH R. BUTLER
STEVEN NOVAK
SEAN RYAN
THE JOHN MARSHALL LAW SCHOOL
VETERANS LEGAL SUPPORT
CENTER & CLINIC
315 S Plymouth Ct.
Chicago, IL 60604
(312) 427-2737
7seng@jmls.edu

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should the *Feres* doctrine be overruled, in whole or in part, on the ground that the FTCA should not be construed to include a non-textual exception barring claims for injuries arising out of activity incident to service, or if there is such an exception, it does not bar a claim for injury to a servicemember caused by medical malpractice at a military hospital when the service member was on leave when admitted to the hospital?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE BENEFITS UNIQUELY OBTAINABLE BY SERVICEMEMBERS AND THEIR FAMILIES ARE NOT GENEROUS WHEN COMPARED TO POSSIBLE RECOVERIES UNDER THE FEDERAL TORT CLAIMS ACT 6

A. Survivors of Wrongful Death Victims Can Receive Large Damage Awards Under the Federal Tort Claims Act 7

B. Dependency and Indemnity Compensation Payments Are Not Generous in Comparison to Damage Awards in Federal Tort Claims Act Cases 9

C. Certain Benefits to Which Servicemembers and Their Families May Be Entitled Are Not Unique to Servicemembers 10

1. Survivors of Servicemembers, Like the Survivors of Many Other Federal Employees, Receive Insurance Payments Which Are Collateral Sources 11

TABLE OF CONTENTS – Continued

Page

2. Since Death Gratuity Is Not Limited to Servicemembers, It Should Not Be Used as a Justification for Limiting Only Servicemembers..... 15

II. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE RECOVERY OF BENEFITS UNDER THE VETERANS' BENEFITS ACT IS NEITHER SWIFT NOR EFFICIENT 17

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Eichel v. New York Central R. Co., 375 U.S. 253 (1963) 13

Feres v. United States, 340 U.S. 135 (1950) ..... *passim*

Gisbrecht v. Barnhart, 535 U.S. 789 (2008) 22

Johnson v. United States, 481 U.S. 681 (1987) ..... *passim*

Kasongo v. U.S., 523 F. Supp. 2d 759 (N.D.Ill. 2007) 7, 8

Molzof v. U.S., 502 U.S. 301 (1992) 13

Shearer v. U.S., 473 U.S. 52 (1985) 7

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) 17

Tello v. U.S., 608 F. Supp. 2d 805 (W.D.Tex. 2009) 8

FEDERAL SETTLEMENTS AND VERDICTS

Brown v. U.S., 2009 WL 3359123 (W.D.Ky.) (Verdict and Settlement Summary) 8

Ellis v. U.S., 2010 WL 1673591 (W.D.Tex.) (Verdict and Settlement Summary) 8

Garcia v. U.S., 2004 WL 2059015 (S.D.Cal.) (Verdict and Settlement Summary) 8

Lowe v. U.S., JAS OH Ref. No. 255895WL, 2010 WL 4249166 (N.D.Ohio) (Verdict and Settlement Summary) 8

TABLE OF AUTHORITIES – Continued

Page

Pearl v. U.S., 2004 WL 2059056 (M.D.Fla.) (Verdict and Settlement Summary) 8

Redwing v. U.S., JVR No. 468190, 2004 WL 5320781 (D.Neb.) (Verdict and Settlement Summary) 8

Row v. U.S., 2003 WL 22723086 (N.D.Ill.) (Verdict and Settlement Summary) 8

Shelton v. U.S., 2008 WL 4964753 (S.D.Iowa) (Verdict and Settlement Summary) 8

Tello v. U.S., 2009 WL 531258 (W.D.Tex.) (Verdict and Settlement Summary) 8

Thames v. U.S., 2009 WL 3469946 (N.D.Cal.) (Verdict and Settlement Summary) 8

Ventimiglia v. U.S., 2010 WL 4079715 (N.D.Cal.) (Verdict and Settlement Summary) 8

Woodruff v. U.S., JAS SC Ref. No. 80115WL, 2001 WL 36045207 (D.S.C.) (Verdict and Settlement Summary) 8

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Brandon HMA, Inc. v. Bradshaw, 809 So.2d 611 (Miss. Sup. Ct. 2001) 14

De Cruz v. Reid, 69 Cal. 2d 217 (Cal. Sup. Ct. 1968) 14

Helfend v. So. Cal. Rapid Transit Dist., 2 Cal. 3d 1 (Cal. Sup. Ct. 1970) 14

TABLE OF AUTHORITIES – Continued

Page

Hrnjak v. Graymar, Inc., 4 Cal. 3d 725 (Cal. Sup. Ct. 1971) 13

Lund v. San Joaquin Valley R.R., 31 Cal. 4th 1 (Cal. Sup. Ct. 2003) 13

St. Francis De Sales Federal Credit Union v. Sun Ins. Co. of New York, 818 A.2d 995 (Me. Sup. Ct. 2002) 14

Swanson v. Brewster, 784 N.W.2d 264 (Minn. Sup. Ct. 2010) 14

FEDERAL STATUTES AND PUBLIC LAWS

5 U.S.C. § 8102 16

5 U.S.C. § 8133 13

5 U.S.C. § 8701 13

10 U.S.C. § 1450 ..... 12, 15

10 U.S.C. § 1451 12

10 U.S.C. § 1475 15

28 U.S.C. § 2412 22

38 U.S.C. § 1110 9

38 U.S.C. § 1310 9

38 U.S.C. § 1311 9

38 U.S.C. § 1965 11

38 U.S.C. § 1966 11

38 U.S.C. § 1967 11

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 1969 ..... 11, 15

42 U.S.C. § 3796 16

Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, 114 Stat. 1822 (2000) 12

National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 647, 117 Stat. 1392 (2003) 15

National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 664, 119 Stat. 3136 (2006) 16

STATE STATUTES AND CODES

West's Ann.Cal.Civ.Code §§ 3333.1(c)(1); 3333.2(c)(1) 14

FEDERAL REGULATIONS

38 C.F.R. § 3.50(b)(2) 9

38 C.F.R. § 3.55(a)(10) 9

OTHER AUTHORITIES

Lexis Nexis, What's it Worth? (Matthew Bender 2009) 7

Edith G. Smith, Government Relations Committee of Gold Star Wives of America, Inc., Written Statement Before The Veterans Disability Benefits Commission, February 22, 2007 12

TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office St. Paul, MN (2011) 19

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Detroit, MI (2010) 19

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Jackson, MS (2010) 19

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Albuquerque, NM (2010) 19, 20

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Philadelphia, PA (2010) 19

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Waco, TX (2010) 19

VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Roanoke, VA (2010) 19

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Board of Veterans' Appeals Report of the Chairman (2009) 21, 22

TABLE OF AUTHORITIES – Continued

Page

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Sen. R. 109-297 (July 31, 2006) (*available at* LEXIS at 109 S. Rpt. 297).....22

Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, Senate Committee on Veterans' Affairs, July 20, 2000, 106th Cong., 2d Sess. (testimony of the Honorable Joseph Thompson).....23

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37 the undersigned submit this brief as *Amici Curiae* in support of Petitioner Alexis Witt, on behalf of the Estate of Dean Witt, Deceased.[1] *Amici Curiae* are attorneys that have extensive experience working with veterans, servicemembers, and their families.

In 2008, The John Marshall Law School established the Veterans Legal Support Center & Clinic ("VLSC"), one of the first law school clinics in the nation dedicated to addressing the various legal issues affecting veterans. Since the primary focus of the VLSC is assisting veterans with appeals before the United States Department of Veterans Affairs ("VA"), the VLSC recognizes the difficulties encountered by veterans, servicemembers, and their families in the recovery of benefits.

The Veterans Legal Assistance Clinic ("VLAC") at Thomas Jefferson School of Law provides legal representation to the residents, alumni, and affiliates of the Veterans Village of San Diego recovery program

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[1] Pursuant to Supreme Court Rule 37, letters indicating *Amici*'s intent to file this *Amicus Curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have issued a blanket consent or have consented to the filing of this *Amicus* brief. Finally, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

for homeless veterans with substance abuse problems. The VLAC provides representation on a wide range of civil legal matters, including child support, child custody and visitation, dissolution of marriage, Social Security and VA benefits, and bankruptcy and other credit and debt matters. The VLAC is committed to seeing that veterans and their families receive full compensation for any injuries sustained during their period of service to our country.

The Lewis B. Puller, Jr. Veterans Benefits Clinic ("VBC"), was established at the nation's oldest law school at the College of William & Mary in 2008. Its purpose is to provide Virginia's 700,000 veteran military service members – especially those who are indigent, homeless or nearly homeless – with information about, and assistance in pursuing, the service-related disability compensation benefits to which they are entitled. The VBC is unique, as it is the only legal clinic in the nation addressing not only the legal challenges, but also the demonstrated psychological effects, that our injured veterans face as they return to civilian life. The clinic is able to offer dual legal and medical services due to its partnership with Virginia Commonwealth University's Center for Psychological Services and Development ("CPSD"). It represents veterans at all stages of the VA process and in physical evaluation boards and discharge upgrades. The VBC specializes in post-traumatic stress disorder and traumatic brain injury representation.

Amicus Michael J. Wishnie is Clinical Professor of Law at Yale Law School and Director of the Veterans' Legal Services Clinic.[2] Founded in September 2010, students enrolled in the Veterans' Legal Services Clinic represent Connecticut veterans in a range of litigation and non-litigation matters, including VA benefits, discharge upgrades, and other civil matters. In its first semester, in its VA benefits cases, the clinic represented veterans before the Veterans Affairs Regional Office, Board of Veterans' Affairs, and the Court of Appeals for Veterans Claims. In addition, students represent local and national organizations in policy and litigation matters relating to the legal needs of veterans. This work has included filing two federal Freedom of Information Act lawsuits against the VA (one involving claims for military sexual trauma and the other regarding claims by servicemembers erroneously discharged on the ground of a personality disorder), as well as an *Amicus* on behalf of mental health experts in a pending challenge to the VA's new Post-Traumatic Stress Disorder regulation in the U.S. Court of Appeals for the Federal Circuit.

One of the reasons the Supreme Court gave for the decision in *Feres v. United States* is that benefits under the Veterans' Benefits Act ("VBA") are generous, swift, and efficient. In the experience of the

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[2] Institutional affiliation is listed for identification purposes only.

Amici, the VA claims process is neither swift nor efficient and the benefits conferred are not at all times generous, especially when compared to possible recoveries under the Federal Tort Claims Act ("FTCA"). As such, even if the existence of VA benefits was a sufficient rationale at the time *Feres* was decided, those benefits no longer support the continued application of the doctrine.

SUMMARY OF ARGUMENT

Since 1950, active-duty military personnel who are killed or injured incident to service have faced a complete bar to bringing possible FTCA actions against the government under this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court listed several policy rationales in support of their interpretation of the FTCA. *Id.* at 142-46. These policy considerations were restated in *Johnson v. United States*, this Court's most recent affirmance of the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the military and the government; (2) the existence of generous statutory death and disability benefits for servicemembers; and (3) the interest of maintaining military discipline. 481 U.S. 681, 688-91 (1987). Focusing on the second rationale, the Court stated that servicemembers are the recipients of "generous" death and disability benefits the recovery of which is both "swift and efficient." *Id.* at 688-89. The Court wrote that the presence of statutory death and disability benefits for

servicemembers and their families was a sufficient reason to bar them from bringing suit against the government. *Id.* at 689. Although it is true that Congress has provided for servicemembers and veterans through both death benefits and service-connected disability benefits under the VBA, these benefits do not compare favorably with the possible awards attainable in an action brought under the FTCA.

First, the monetary awards for wrongful death which can be obtained far outweigh what a deceased servicemember's family receives as a direct result of the death of the servicemember. Much of what the family receives pursuant to military death benefits statutes is no greater than the statutory death benefits available to family members of civilians. Nevertheless, civilians are allowed to pursue FTCA actions while servicemembers are not. Many of these benefits are considered collateral sources, and therefore are not off-setting when determining a damage award under the FTCA. The remainder of benefits which are uniquely available to servicemembers and their families hardly compare to average awards obtained under an FTCA action for wrongful death.

Second, when a servicemember is injured by negligence and subsequently discharged from the military, the servicemember must enter the veterans benefits system administered by the VA. The sheer volume of claims that the VA is charged with adjudicating leads to unacceptable levels of errors and delays.

The benefits received by servicemembers and their families for death and injuries are not always generous; nor are they always swiftly and efficiently delivered. As such, one of the bases on which the *Feres* doctrine is predicated on is in error, and this Court should grant *certiorari* to revisit the doctrine.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE BENEFITS UNIQUELY OBTAINABLE BY SERVICEMEMBERS AND THEIR FAMILIES ARE NOT GENEROUS WHEN COMPARED TO POSSIBLE RECOVERIES UNDER THE FEDERAL TORT CLAIMS ACT

In *Feres v. United States*, 340 U.S. 135 (1950), this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. U.S.*, 340 U.S. 135, 146 (1950). In *Johnson v. United States*, the Court restated the factors that underlie the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the military and the government; (2) the existence of generous statutory death and disability benefits for servicemembers; and (3) the interest of maintaining military discipline. 481 U.S. 681, 688-91 (1987). With respect to the second factor, the Court stated that, "the existence of these

generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." 481 U.S. at 689.[3] Because the death and disability benefits which are only obtainable by servicemembers are not generous when compared to a possible recovery under the FTCA, the existence of these benefits should not be used to support the continued application of the *Feres* doctrine.

A. Survivors of Wrongful Death Victims Can Receive Large Damage Awards Under the Federal Tort Claims Act

The United States has paid out millions of dollars in damages over the past decade in wrongful death claims under the FTCA. A survey of recent wrongful death cases brought under the FTCA[4] identified judgments and settlements up to $9,000,000.00[5] with an average award of $2,207,794.90.[6] These

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[3] When the Court made that statement it was, in fact, resurrecting an abandoned rationale for the *Feres* doctrine that had been previously deemed "no longer controlling." *Id.* at 697 (Scalia, J., dissenting) (quoting *Shearer v. U.S.*, 473 U.S. 52, 58 n.4 (1985))

[4] Lexis Nexis, What's it Worth? (Matthew Bender 2009) § 28.2.

[5] *Kasongo v. U.S.*, 523 F. Supp. 2d 759 (N.D. Ill. 2007).

[6] Lexis Nexis, What's it Worth? (collecting cases, verdicts and settlements: *Christian v. U.S.*, 01:06-cv-00340-OWW-TAG, p. 28-2 ($2,000.00); *Robinson v. U.S.*, 1:06-CV-01973, p. 28-7 ($30,000.00); *Harris v. U.S.*, 05-C-5524 ($315,000.00); *Reed v. U.S.*, 05-05066, p.28-21 ($200,000.00); *Franz v. U.S.*, 04-6002, p. 28-26 ($1,700,000.00); *Bailey v. U.S.*, 06-1191, p. 28-43 ($4,762,236.22);

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numbers are based on many variables, such as age and surviving heirs. In wrongful death cases over the past decade in which the decedent left a surviving spouse and at least one minor child, awards and settlements ranged from $313,390.91[7] to $5,000,000.00[8] resulting in an average award of $1,824,211.21.[9] Where the decedent is survived by minor children, awards may far exceed the statutory compensation available to surviving family members of a deceased servicemember. *See Kasongo v. U.S.*, 523 F. Supp. 2d

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Kasongo v. U.S., 04-C-4901, p. 28-60 ($9,000,000.00); *Mayo-Parks v. U.S.*, 2003CV3497, p 28-65 ($1,653,123.00)).

[7] *Tello v. U.S.*, 608 F Supp. 2d 805 (W.D.Tex. 2009).

[8] *Brown v. U.S.*, 2009 WL 3359123 (W.D.Ky.) (Verdict and Settlement Summary).

[9] Cases collected from WestlawNext verdict search *Woodruff v. U.S.*, JAS SC Ref. No. 80115WL, 2001 WL 36045207 (D.S.C.) (Verdict and Settlement Summary) ($907,670.00); *Garcia v. U.S.*, 2004 WL 2059015 (S.D.Cal.) (Verdict and Settlement Summary) ($400,000.00); *Shelton v. U.S.*, 2008 WL 4964753 (S.D.Iowa) (Verdict and Settlement Summary) ($4,612,251.51); *Redwing v. U.S.*, JVR No. 468190, 2004 WL 5320781 (D.Neb.) (Verdict and Settlement Summary) ($420,000.00); *Row v. U.S.*, 2003 WL 22723086 (N.D.Ill.) (Verdict and Settlement Summary) ($485,000.00); *Pearl v. U.S.*, 2004 WL 2059056 (M.D.Fla.) (Verdict and Settlement Summary) ($2,000,000.00), *Ventimiglia v. U.S.*, 2010 WL 4079715 (N.D.Cal.) (Verdict and Settlement Summary) ($1,475,000.00); *Lowe v. U.S.*, JAS OH Ref. No. 255895WL, 2010 WL 4249166 (N.D.Ohio) (Verdict and Settlement Summary) ($4,000,000.00); *Ellis v. U.S.*, 2010 WL 1673591 (W.D.Tex.) (Verdict and Settlement Summary) ($1,796,222.23); *Thames v. U.S.*, 2009 WL 3469946 (N.D.Cal.) (Verdict and Settlement Summary) ($500,000.00); *Brown v. U.S.*, 2009 WL 3359123 (W.D.Ky.) (Verdict and Settlement Summary) ($5,000,000.00); *see also Tello*, 608 F. Supp. 2d 805 ($313,390.91).

759 (N.D.Ill. 2007) (immigrant family who lost their mother due to malpractice at a federally funded clinic was awarded $9,000,000.00 including $1,000,000.00 for loss of society to each of decedent's three children).

B. Dependency and Indemnity Compensation Payments Are Not Generous in Comparison to Damage Awards in Federal Tort Claims Act Cases

Survivors of servicemembers who die on active duty receive Dependency and Indemnity Compensation ("DIC") from the VA. 38 U.S.C. § 1310.[10] As such, eligible survivors receive a tax exempt flat-rate monthly payment. 38 U.S.C. § 1311(a). Under current DIC rates, monthly compensation payments for a surviving spouse and each minor child are $1,154.00 and $286.00 respectively. 38 U.S.C. §§ 1311(a)(1), (b). If the spouse remarries or begins living with a member of the opposite sex before the age of fifty-seven, entitlement to DIC benefits is revoked. *See* 38 C.F.R. §§ 3.55(a)(10); 3.50(b)(2).

Even assuming the spouse of the deceased servicemember does not remarry, the total annual

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[10] DIC is provided to the survivors of servicemembers who die while on active duty, like the Petitioner's decedent, or from a service connected disability during retirement. *Id.* However, servicemembers who are only injured would be entitled to receive service connected disability compensation from the VA upon discharge. 38 U.S.C. § 1110 (describing basic entitlement to service connected disability compensation).

compensation amount does not compare with the nearly $2,000,000.00 awarded on average in FTCA claims for wrongful death. *See* section I.A. *supra*. Although a damage award is fact specific and dependent on a variety of factors, the receipt of DIC should not completely preclude the survivors of servicemembers from seeking such awards in the federal courts which are available to all other citizens injured by the federal government.

C. Certain Benefits to Which Servicemembers and Their Families May Be Entitled Are Not Unique to Servicemembers

In *Johnson*, the Court found it "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." 481 U.S. at 690. Yet many of these benefits are of the same kind as those obtainable by civilians, particularly those in federal employ. As noted repeatedly in this Court's *Feres* jurisprudence, Congress has "omitted any provision to adjust [statutory disability and death benefits and remedies obtainable under the FTCA] and to each other." 340 U.S. at 144. Because Congress has similarly omitted any provision to adjust FTCA remedies to comparable civilian benefits, the benefits obtainable by servicemembers and their families should not be used to justify the continued application of the *Feres* doctrine.

Benefits provided to survivors of servicemembers include: a death gratuity, life insurance under the Servicemembers' Group Life Insurance ("SGLI"), and annuities under the Survivor Benefit Plan ("SBP"). However, because these benefits are no more "generous" when compared to similar death benefits received by civilians and are not off-setting as collateral sources, there is no reason to include amounts obtained through these statutory provisions when comparing benefits received to possible FTCA awards.

1. Survivors of Servicemembers, Like the Survivors of Many Other Federal Employees, Receive Insurance Payments Which Are Collateral Sources

Survivors, as beneficiaries, receive a term life insurance payment under SGLI and an annuity under the SBP program. Like most federal employees, upon enlistment or appointment to any of the uniformed services, members are automatically enrolled in a term life insurance policy under SGLI. 38 U.S.C. § 1967.[11] Beneficiaries can receive a maximum payment of $400,000.00. 38 U.S.C. § 1965.[12] In

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[11] Servicemembers can opt out of coverage, decrease the monetary coverage amount, and assign non-family beneficiaries. *See also* 38 U.S.C. § 1966 (Policies purchased and partly subsidized by the government from private insurers); 38 U.S.C. § 1969 (Monthly premiums are deducted from the member's basic pay until separation or release from active duty)

[12] In January 2004, the maximum payment was $250,000.00 for beneficiaries of an active duty staff sergeant who died in the line of duty while on permanent change of station leave status

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addition to a SGLI insurance payment, a surviving spouse (or beneficiary) is also entitled to annuity insurance under the SBP program. 10 U.S.C. § 1450. This monthly SBP annuity pays a surviving spouse 55% of the retired pay the member would have been entitled to on the day they died.[13] 10 U.S.C. § 1451. However, if the spouse is the designated beneficiary, the annuity is reduced by the amount of DIC payments received. 10 U.S.C. § 1451(c)(2).[14] Finally, if a spouse remarries before the age of fifty-five, the SBP annuity ends. 10 U.S.C. § 1450(b).

Servicemembers are not the only class of employees to receive life insurance from the federal government. Most federal employees including members of Congress and federal judges are enrolled in life

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Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419 114 Stat. 1822 (2000)

[13] To calculate the annuity, the services assume that the member died with a 100% total disability. Total disability means that the member's retired pay would be 75% of High-36 (i.e., retirement eligible, more than 20 years of service; High-36 means the highest pay grade salary for a 36 month period) or final pay (i.e., non-retirement eligible, less than 20 years of service) at time of death with the SBP annuity based on 55% of that amount. The final SBP payment calculation is taxable.

[14] When a child is the designated beneficiary, the monthly SBP payment is not reduced by the DIC. 10 U.S.C. §§ 1450(a)(1), (2). This discrepancy in the DIC offset has been criticized as a "widow's tax." Edith G. Smith, Government Relations Committee of Gold Star Wives of America, Inc., Written Statement Before The Veterans Disability Benefits Commission, February 22, 2007

insurance under the Federal Employees Group Life Insurance Act ("FEGLI") of 1954. *See* 5 U.S.C. §§ 8701 *et seq.* (authorizing the FEGLI policy). Indeed, widows and children of deceased federal employees receive monthly compensation under a program similar to SBP, provided by the Federal Employment Compensation Act ("FECA"). 5 U.S.C. §§ 8133 *et seq.* (2010).[15] Despite the existence of FEGLI and FECA, civilian federal employees are not barred from bringing claims under the FTCA.

As has been settled by this Court, plaintiffs under the FTCA are able to recover damages allowed under state law. *Molzof v. U.S.*, 502 U.S. 301, 305 (1992). Many states, including California, follow the common law "collateral source" rule which prevents a tortfeasor from reducing damages paid to the plaintiff from a collateral source. *See, e.g., Lund v. San Joaquin Valley R.R.*, 31 Cal. 4th 1, 9-10 (Cal. Sup. Ct. 2003) (citing *Hrnjak v. Graymar, Inc.*, 4 Cal. 3d 725, 729 (Cal. Sup. Ct. 1971)) (noting that California continues to accept the collateral source rule).[16] States

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[15] A qualifying surviving spouse is eligible to receive 45% of the monthly pay of the deceased federal employee, while 15% is added for each additional child, not to exceed 75%. 5 U.S.C. § 8133(a)(3). The 75% maximum benefit received under FECA is higher than the 55% received under SBP.

[16] The collateral source rule has also been adopted by the federal courts. *See Eichel v. New York Central R. Co.*, 375 U.S. 253, 254 (1963) (stating that "[r]espondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner" in reference to the receipt of payments pursuant to

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with similar rules prevent defendants from limiting their liability based on benefits paid to the plaintiff from an independent source.[17] In these states, such benefits which are considered from a collateral source include both life insurance payments and retirement or disability payments. *See, e.g., Helfend v. So. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 10 (Cal. Sup. Ct. 1970) (recognizing that California follows the collateral source rule for insurance payments); *De Cruz v. Reid*, 69 Cal. 2d 217, 223-24 (Cal. Sup. Ct. 1968) (recognizing that California follows the collateral source rule for workers' compensation payments).

As such, Petitioner's receipt of SGLI and annuities under SBP would be considered collateral sources. SGLI is simply a term life insurance policy which is partially funded by premiums deducted from

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the Railroad Retirement Act. Although California has passed a statute limiting the rule in cases of medical malpractice, the statute is inapplicable in a case such as this due to the David Grant Medical Center not being a "health care provider" under the statute. *See* West's Ann.Cal.Civ.Code § 3333.1(c)(1), § 3333.2(c)(1) (defining "health care provider" as " . . . any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code [of California]").

[17] *See, e.g., St. Francis De Sales Federal Credit Union v. Sun Ins. Co. of New York*, 818 A.2d 995, 1001-02 (Me. Sup. Ct. 2002) (noting the collateral source rule is used in Maine), *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss. Sup. Ct. 2001) (same). *But see, e.g., Swanson v. Brewster*, 784 N.W.2d 264, 270 (Minn. Sup. Ct. 2010) (recognizing that Minnesota had abrogated the collateral source rule through statute).

a servicemember's military pay. 38 U.S.C. § 1969(a)(1). Annuities paid to survivors under SBP are intended to replace the retirement pay servicemembers would have been entitled to but for their untimely demise. 10 U.S.C. § 1450(c)(3). Such life insurance payments would be considered a collateral source.

States vary on their treatment of the collateral source rule; however, such geographical inequity is certainly better than a complete bar to recovery. *See Johnson*, 481 U.S. 681, 695-96 (Scalia, J., dissenting) ("nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery"). Because the collateral source rule would prevent the receipt of death gratuity, SGLI, and SBP from reducing Petitioner's damages in an FTCA action, these payments should not be considered when determining whether VBA benefits are so "generous" as to completely preclude actions by servicemembers under the FTCA.

2. Since Death Gratuity Is Not Limited to Servicemembers, It Should Not Be Used as a Justification for Limiting Only Servicemembers

Survivors of servicemembers who die on active-duty while in the line of duty receive a death gratuity to recognize the significant sacrifice evoked by the loss of life. 10 U.S.C. § 1475.[18] The $100,000.00 death

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[18] *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 647, 117 Stat. 1392, 1397 (2003) (Congress

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gratuity payment that survivors receive, even as a result of a wrongful death, is not generous when compared to civilian death benefits.

Survivors of certain groups of civilians also receive a statutory death gratuity. In particular, survivors of city, state, and federal government law enforcement officers and firefighters who die in the line of duty may be entitled to a lump sum payment of $250,000.00 under the Public Safety Officers' Benefits Act. 42 U.S.C. §§ 3796 *et seq*. *See also* GAO Report, Survivor Benefits for Servicemembers and Federal, State, and City Government Employees, GAO-04-814 (July 2004). Civilians employed as contractors who die "of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation" receive a death gratuity of $100,000.00. 5 U.S.C. § 8102a(a). Additionally, victims of the September 11, 2001 attacks received an average compensation payment of $2,082,128.00 under the Department of Justice September 11th Victim Compensation Fund. *See* Department of Justice,

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increased the death gratuity from $6,000.00 to $12,000.00 effective for deaths occurring after September 10, 2001) *and* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No 109-163, § 664, 119 Stat. 3136, 3316 (2006)) (Increased the death gratuity from $12,000.00 to $100,000.00 following concern that death gratuity payments for survivors were not keeping pace with similar compensation made to civilian first responders and civilian casualties from terrorist attacks). *See also* "Final Report. Review of Military Death Benefits", SAG Corporation, GS-10F-0312L, April 2004.

September 11th Victim Compensation Fund, *available at* http://www.justice.gov/archive/victimcompensation/payments_deceased.html. Despite these benefits, federal employees, civilian contractors, first responders, and victims of terrorist attacks are not barred by the *Feres* doctrine from bringing claims against the government.

II. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE RECOVERY OF BENEFITS UNDER THE VETERANS' BENEFITS ACT IS NEITHER SWIFT NOR EFFICIENT

Central to the Court's holding in *Feres* was the assumption that compensation for servicemembers was "simple, certain, and uniform." *Feres*, 340 U.S. at 144. In *Johnson,* the Court reiterated that assumption, stating that "the recovery of benefits is 'swift [and] efficient,'" under the VBA. 481 U.S. at 690 (quoting *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977)). However, the reality is that the VA, the agency that administers benefits to veterans, is currently working under a substantial backlog. Veterans and the families of veterans who find themselves in the VA claims process are facing significant delays at both the initial and appeal levels.

The VA compensation system does not currently resemble the simple and certain process referenced by the *Feres* Court over 50 years ago. There are numerous and potentially time-consuming steps that the VA undertakes before an initial decision is

issued.[19] As a whole, the VA regional offices ("VARO") take an average of 170 days to render an initial decision after a claim for benefits has been submitted.[20] The number of initial claims pending at the end of fiscal year 2008 was about 343,000.[21] If the original claim is denied or if an error exists with the initial decision issued by the VA, then veterans have the option to appeal to the next level of the administrative claims process, the Board of Veterans' Appeals ("BVA").

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[19] United States Government Accountability Office, Military and Veterans Disability System, Preliminary Observations on Evaluation and Planned Expansion of DOD/VA Pilot 2-3 (2010) "VA's disability compensation claims process starts when a veteran submits a claim listing the medical conditions that he or she believes are service connected. . . . For each claimed condition, VA must determine if there is credible evidence to support the veteran's contention of a service connection Such evidence may include the veteran's military service records and treatment records from VA medical facilities and private medical service providers. Also, if necessary for reaching a decision on a claim, VA arranges for the veteran to receive a medical examination. . . . Once a claim has all of the necessary evidence, a VA rating specialist evaluates the claim and determines whether the claimant is eligible for benefits If so, the rating specialist assigns a percentage rating." *Id.* (footnote omitted).

[20] Department of Veterans Affairs FY2010 Performance and Accountability Report, Part II – Performance Measures Tables 128 (2010).

[21] United States Government Accountability Office, Veterans' Disability Benefits, Preliminary Findings on Claims Processing Trends and Improvement Efforts Title page, "What the GAO Found" (2009).

In the VA's own estimation, only 84% of original decisions are accurately decided.[22] Veterans in certain geographic locations encounter inaccuracy rates as high as 36%,[23] leading to a dramatic lack of uniformity in

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[22] Department of Veterans Affairs FY2010 Performance and Accountability Report, Part II – Performance Measures Tables 128 (2010). This statistic is explained in Part I – Performance Shortfall Analysis 85 (2010). "The [inaccuracies are] largely due to deficiencies in the development of claims, particularly involving either missing examinations/medical opinions or where claims were rated based on inadequate examinations/opinions. Additionally, attrition of experienced personnel, especially in positions where extensive training is required, has been detrimental in terms of both production and quality."

[23] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Waco, TX i (2010). *See also* VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Milwaukee, WI 2 (2011) (error rate 22%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Denver, CO i (2010) (error rate 21%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Jackson, MS i (2010) (error rate 24%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Philadelphia, PA 1 (2010) (error rate 33%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Albuquerque, NM i (2010) (error rate 36%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office St Paul, MN i (2011) (error rate 15%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Detroit, MI 1 (2010) (error rate 21%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Togus, ME 1 (2010) (error rate 26%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Roanoke, VA 1 (2010) (error rate 25%).

the administration of VA benefits.[24] At a minimum, such errors can lead to significant delays in the recovery of benefits.

Office of Inspector General reports for individual VAROs provide insight into the types of errors that occur in the claims process. For instance, at the VARO in Albuquerque, New Mexico, top-level positions were left vacant, and one of the positions was filled by multiple acting managers who received no training or guidance.[25] In Denver, Colorado, "no review process was in place to ensure staff input required dates for future medical exams in the electronic record. As a result, veterans . . . did not always receive accurate benefits."[26]

The appeal of claims to the BVA level of the administrative scheme carries an even larger delay than that seen at the initial stage of the claims

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[24] *See infra* note 23.

[25] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Albuquerque, NM i (2010) "During FY 2009, the VARO Director's position was vacant for approximately 3 months and from FY 2009–2010, the Veterans Service Center Manager (VSCM) position was vacant for approximately 6 months Both positions are key leadership positions within the VARO. Three different acting managers filled the vacant VSCM position, two of whom reported they never received training or guidance on the responsibilities associated with that position. We believe these vacancies were a contributing factor to the high error rates for the claims we reviewed " *Id.*

[26] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Denver, CO 4 (2010)

process. The inefficiency in the administration of benefits is perhaps best exemplified by the fact that VA reports appear unable to agree on exactly how long it takes to process a BVA claim. One report listed that on average, the total elapsed processing time to issue a BVA decision in fiscal year 2009 was 1,082 days.[27] However, another report calculated the elapsed processing time at 709 days for fiscal year 2009.[28] In either case, it is a long wait for a veteran in need to receive benefits. Unfortunately, the lengthy wait in no way guarantees an accurately rendered BVA decision.

A veteran seeking to appeal a BVA decision must file a notice of appeal with the United States Court of Appeals for Veterans Claims ("CAVC").[29] In 2009, the CAVC only affirmed approximately 17% of the 3,270 BVA decisions that it reviewed.[30] Astonishingly, in

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[27] Board of Veterans' Appeals Report of the Chairman 16 (2009)

[28] Department of Veterans Affairs FY2010 Performance and Accountability Report Part II – Performance Measures Tables 133 (2010).

[29] United States Court of Appeals for Veterans Claims Annual Reports FY2000-09, *available at* http://www.uscourts.cavc.gov/annual_report/. "The United States Court of Appeals for Veterans Claims is a national court of record, established under Article I of the Constitution of the United States. The Court has exclusive jurisdiction to provide judicial review of final decisions by the Board of Veterans' Appeals, an entity within the Department of Veterans Affairs." *Id.*

[30] United States Court of Appeals for Veterans Claims Annual Reports FY2000-09, *available at* http://www.uscourts.cavc.gov/annual_report/ (3,270 merits decisions in 2009; 571 decisions affirmed in 2009).

that same year, the CAVC granted 2,385 Equal Access to Justice Act applications.[31] This means that in a large number of claims the government had not taken a substantially justifiable position. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 789 (2008) (citing 28 U.S.C. § 2412(d)(1)(A)) (stating the relevant standard required for EAJA awards).

One cause of the delay in claims processing times is the crushing backlog of cases. The BVA began fiscal year 2010 with a backlog of 40,688 claims.[32] The disconcerting fact is that the number of claims pending at the BVA level has increased over the past year.[33]

The complexity of the VA claims process has not gone unnoticed. In 2006, the United States Senate Committee on Veterans' Affairs reported that "there has been a growing recognition that the claims process is no longer a 'relatively uncomplicated procedure.' Sen. R. 109-297 (July 31, 2006) (*available at* LEXIS at 109 S. Rpt. 297). The VA has likewise recognized that the process is no longer simple. In testimony before Congress, then-Under Secretary for Benefits, Joseph Thompson, stated: 'The Veterans Disability Compensation Program is the most complex disability claims system in the Federal government.'"

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[31] *Id.*

[32] Board of Veterans' Appeals Report of the Chairman 14 (2009) (There were 36,452 cases pending at the start of fiscal year 2009 and 40,688 cases pending at the end of fiscal year 2009)

[33] *Id.*

Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, Senate Committee on Veterans' Affairs, July 20, 2000, 106th Cong., 2d Sess. (testimony of the Honorable Joseph Thompson).

As the wars in Iraq and Afghanistan continue, more servicemembers will be seeking benefits from the VA upon their return home. Even though the VA is one of the largest administrative agencies in the United States Government, or perhaps for that reason, it is still unable to handle in a swift and efficient manner the enormous volume of benefits claims that it receives.

CONCLUSION

The benefits available to the men and women of our nation's armed forces, or their survivors, for injuries suffered incident to their service are not so generous, swift, or efficient such as to support a policy rationale for completely denying redress of their injuries under the FTCA. The monetary benefits of a damages award under the FTCA greatly outweigh such benefits which are uniquely available to the military. Most of the benefits at issue are not of a kind unique to military service, and are available for many in civilian government service. Servicemembers who survive their injuries frequently find their claims pending in a lengthy administrative process at the VA. The adjudication of such claims become subject to

errors and lengthy delays which hardly embody the swift and efficient compensation envisioned by the Court in *Feres* and *Johnson*. Therefore, the mere existence of such benefits available to service-members and their families cannot be considered an independent basis for upholding the *Feres* doctrine.

Respectfully submitted,

MICHAEL P. SENG
Counsel of Record
JOSEPH R. BUTLER
STEVEN NOVAK
SEAN RYAN
THE JOHN MARSHALL LAW SCHOOL
VETERANS LEGAL SUPPORT
CENTER & CLINIC
315 S. Plymouth Ct.
Chicago, IL 60604
(312) 427-2737
7seng@jmls.edu

Attorneys for Amicus Curiae